

FEDERAL COURT OF AUSTRALIA

Ashraf v Minister for Immigration and Border Protection [2018] FCAFC 50

Appeal from: *Ashraf v Minister for Immigration* [2017] FCCA 373

File number: VID 282 of 2017

Judges: **TRACEY, MORTIMER AND MOSHINSKY JJ**

Date of judgment: 3 April 2018

Catchwords: **MIGRATION** – appeal from the Federal Circuit Court of Australia – skilled visa – where the Migration Review Tribunal affirmed decision of a delegate of the Minister to refuse visa – where grounds of Tribunal’s decision included failure to satisfy Public Interest Criterion 4020 – where applicant requested the Tribunal to summon a witness, namely the person who had purportedly signed a work experience reference, but the Tribunal did not do so – whether Tribunal decision affected by jurisdictional error – appeal dismissed

Legislation: *Migration Act 1958* (Cth), ss 5, 56, 97, 352, 359, 363, 424
Migration Regulations 1994 (Cth), Sch 4, cl 4020

Cases cited: *Abebe v Commonwealth of Australia* (1999) 197 CLR 510
AZAFB v Minister for Immigration and Border Protection (2015) 244 FCR 144
BMF16 v Minister for Immigration and Border Protection [2016] FCA 1530
DZADQ v Minister for Immigration and Border Protection (2014) 143 ALD 659
Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (2016) 244 FCR 178
Minister for Immigration and Border Protection v Singh (2014) 231 FCR 437
Minister for Immigration and Citizenship v Khadgi (2010) 190 FCR 248
Minister for Immigration and Citizenship v Le (2007) 164 FCR 151
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332
Minister for Immigration and Citizenship v SZIAI (2009) 259 ALR 429

Minister for Immigration and Citizenship v SZKTI (2009) 238 CLR 489

Minister for Immigration and Multicultural Affairs v Anthonypillai (2001) 106 FCR 426

MZABA v Minister for Immigration and Border Protection (2015) 234 FCR 425

Patel v Minister for Immigration and Border Protection (2015) 145 ALD 566

Perera v Minister for Immigration and Multicultural Affairs [2002] FCA 743

Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155

SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 294

SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 150 FCR 214

SZLPO v Minister for Immigration and Citizenship (No 1) (2009) 177 FCR 1

SZOIN v Minister for Immigration and Citizenship (2011) 191 FCR 123

SZRLO v Minister for Immigration and Citizenship [2013] FCA 825

Transurban City Link Ltd v Allan (1999) 95 FCR 553

Wei v Minister for Immigration and Border Protection (2015) 257 CLR 22

Date of hearing:	8 November 2017
Registry:	Victoria
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	71
Counsel for the Appellant:	Mr N Wood with Mr A Yuile
Solicitor for the Appellant:	Da Gama Pereira and Associates
Counsel for the First Respondent:	Mr R Knowles
Solicitor for the First Respondent:	Australian Government Solicitor

Counsel for the Second
Respondent:

The second respondent filed a submitting notice, save as to
costs

ORDERS

VID 282 of 2017

BETWEEN: **MUHAMMAD FARHAN ASHRAF**
 Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGES: **TRACEY, MORTIMER AND MOSHINSKY JJ**

DATE OF ORDER: **3 APRIL 2018**

THE COURT ORDERS THAT:

1. 1. The appeal be dismissed.
2. 2. The first respondent's application for leave to file a notice of contention be dismissed.
3. 3. The appellant pay the first respondent's costs of the appeal (other than the costs of the application for leave to file a notice of contention), to be fixed by way of a lump sum.

4. THE COURT DIRECTS THAT:

5. 4. Within 14 days, the parties file any agreed proposed minute of orders fixing a lump sum in relation to the first respondent's costs.
6. 5. In the absence of any agreement pursuant to paragraph 4 of these orders, within 21 days the first respondent file and serve an affidavit constituting a Costs Summary in accordance with paragraphs 4.10 to 4.12 of the Court's *Costs Practice Note* (GPN-COSTS).
7. 6. Within a further 14 days, the appellant file and serve any Costs Response in accordance with paragraphs 4.13 to 4.14 of the *Costs Practice Note* (GPN-COSTS).
8. 7. In the absence of any agreement having been reached within a further 14 days, the matter of an appropriate lump sum figure for the first respondent's costs be referred to a Registrar for determination.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

Introduction

1 1 The appellant is a citizen of Pakistan. He arrived in Australia in July 2006 on a student visa. In May 2009, he applied for a Skilled Graduate (Temporary) (Class VC, subclass 485) visa (**skilled visa**) in which he nominated the occupation of cook. In August 2009, in support of his visa application, the appellant provided a skills assessment from Trades Recognition Australia (**TRA**). The skills assessment was based on a work experience reference dated about 2 July 2009 from a restaurant called L'Aspromonte that stated that the appellant had undertaken work experience as a cook and had worked for more than 940 hours at the restaurant (the **Work Experience Reference**). The reference was purportedly signed by the owner and head chef of the restaurant, who we will refer to in these reasons as "Ms S".

2 2 Subsequently, by letter dated 5 July 2010, TRA withdrew its skills assessment for the appellant.

3 3 The appellant's application for a skilled visa was refused by a delegate (the **Delegate**) of the first respondent (the **Minister**).

4 4 The appellant applied to the Migration Review Tribunal (the **Tribunal**) for review of that decision. The main issue before the Tribunal was whether the appellant satisfied Public Interest Criterion 4020 (**PIC 4020**), which was set out in cl 4020 of Sch 4 to the *Migration Regulations 1994* (Cth). This criterion was to the effect that there was no evidence that the appellant had given or caused to be given to the Minister a bogus document. The expression "bogus document" included a document that the Minister reasonably suspected was obtained because of a false or misleading statement. In correspondence before the hearing, the Tribunal had invited the appellant to comment on evidence that: a person, who we will refer to in these reasons as "Mr C", had pleaded guilty in criminal proceedings to the manufacture and sale of work references matching the Work Experience Reference; Mr C had admitted that the work references were fraudulent in content; and the appellant's Work Experience Reference had been found in Mr C's possession. These matters were also raised with the appellant during the hearing before the Tribunal. Both before and after the hearing, the appellant requested that the Tribunal summon Ms S to give evidence (the Tribunal having the power to summon a witness to appear before the Tribunal to give evidence under s 363(3)(a)

of the *Migration Act 1958* (Cth)), but the Tribunal did not do so. The Tribunal was satisfied that there was evidence that the appellant had given, or caused to be given, a bogus document (namely, the TRA skills assessment) to the Minister in relation to the visa application. The Tribunal concluded that the appellant did not meet PIC 4020 and affirmed the decision of the Delegate.

5 The appellant applied to the Federal Circuit Court of Australia for judicial review of the Tribunal's decision. That application was dismissed. The appellant appeals to this Court from the orders of the Federal Circuit Court.

6 For the reasons that follow, the appeal is to be dismissed. The appellant has not demonstrated that the Federal Circuit Court erred in dismissing the application for judicial review. In particular, it is not demonstrated that the primary judge erred in not concluding that the Tribunal's decision was affected by jurisdictional error.

Background facts

7 The following statement of the background facts is based on the reasons of the primary judge, the reasons of the Tribunal and the documents in the Appeal Book. It is also based on certain additional facts agreed between the parties in the course of the appeal hearing (as indicated below).

8 In July 2006, the appellant arrived in Australia on a student visa.

9 On 4 May 2009, the appellant applied for a skilled visa. He nominated the occupation of cook on his application.

10 On 5 August 2009, the appellant provided a TRA skills assessment in support of his application. To obtain the skills assessment, the appellant had provided TRA with the Work Experience Reference (AB 42-44). The reference is on the letterhead of L'Aspromonte restaurant. It is a three-page typed letter, detailing work undertaken by the appellant. The first two paragraphs state:

This is to certify that [the appellant] has been working for L'Aspromonte from 03/09/08 till 20/06/09 as a cook.

[The appellant] has undertaken unpaid work experience as a cook and contributes more than 940hrs to our restaurant. He worked for more than 20 hours/week during his breaks & Christmas holidays. During his tenure of employment with us he was working under the supervision of a head chef ([Ms S]).

11 11 The letter is not dated at the top of the first page, but the date 2 July 2009 is stamped at the foot of each page, adjacent to a certification by the appellant's migration agent.

12 12 In December 2009, Ms S was interviewed by investigators on behalf of the Department of Immigration and Citizenship (the **Department**), as it then was. There were two interviews: the first on 14 December; the second on 21 December. The transcripts of these interviews (with certain material redacted) are included in the Appeal Book (commencing at AB 74 and AB 177 respectively). During the first interview, Ms S was asked about work experience references provided by L'Aspromonte in respect of visa applicants. The transcript includes the following (at AB 98):

Q213. Were you involved in signing the letters?

A No.

Q214. So you've never signed any of the work references?

A Never.

Q214. Have you written any of the work references?

A Never.

13 13 Ms S was asked questions about specific people who were the subject of work experience references. One of these was the appellant. In relation to the appellant, the transcript includes (at AB 157):

Q782. ... OK, I now produce Exhibit 1/127T in the name of [the appellant]?

A Yeah.

Q783. So do you know this person?

A Yeah.

Q784. It says that they worked for you on this work reference for 940 hours?

A No they didn't.

Q785. No? OK. How many hours would they have done?

A Couple of hundred maybe.

Q786. OK. And ...

A No.

Q (cont'd) ... not your signature?

A No.

14 14 It is convenient to note at this point that in the early part of the first interview, Ms S was asked for her home address (question 24 at AB 77). Her answer to this question is redacted in the transcript included in the Appeal Book. Also, during the second interview, she was asked to confirm her email address (question 429 at AB 219). Again, the answer to this question is redacted in the version of the transcript in the Appeal Book.

15 15 On 5 July 2010, TRA withdrew its skills assessment letter for the appellant. It would appear that this was due to concerns over the Work Experience Reference. The withdrawal

letter stated that, on 25 February 2010, TRA had advised of its proposed course of action to revoke the skills assessment and requested that the appellant respond. The letter of 5 July 2010 stated that the appellant had requested an extension of time in which to respond, and that the extension had been granted. It then stated that the appellant had “failed to provide any further evidence to support [his] employment with L’Aspromonte” and that TRA had accordingly withdrawn the skills assessment for the reasons outlined in the earlier correspondence. The letter concluded by noting that the appellant was not prevented from submitting a new application to TRA in the future.

16 16 On 24 January 2012, the Department wrote to the appellant inviting him to comment on suspected fraudulent information provided with his visa application. The letter referred to PIC 4020, a copy of which was attached to the letter. It explained that a failure to satisfy PIC 4020 might result in the visa applicant being refused the grant of a visa and subject to an exclusion period. The letter stated that it had been brought to the Department’s attention that the appellant might not satisfy PIC 4020 on the basis of certain information as set out in the letter. This included that: in November 2011, Mr C had pleaded guilty to the manufacture and sale of work references matching the one submitted to TRA to obtain the appellant’s skills assessment; and Mr C had admitted that the documents were fraudulent in content. As a result of these events, the letter stated, the Department had reason to believe that the skills assessment submitted as part of the appellant’s visa application had been fraudulently obtained.

17 17 On 24 March 2012, the appellant’s migration agent sent an email to the Department. The letter stated that: the Work Experience Reference was “a genuine document”; it was presented to the appellant by the owner/manager of L’Aspromonte; the appellant maintained that the document was presented to him by Ms S for volunteer work he had completed during the period set out in the letter; and the content of the document was a true representation of the volunteer work experience he undertook at the restaurant.

18 18 By letter dated 16 January 2013, the Department again wrote to the appellant inviting him to comment on adverse information that it had received. After referring to PIC 4020, the TRA skills assessment provided by the appellant on 5 August 2009, and the Work Experience Reference, the letter referred to the interview with Ms S on 14 December 2009. The transcript of the interview was attached to the letter. It is not clear whether this was the transcript of the first interview alone or the transcripts of both interviews. Nothing turns on

this. The transcript provided with the letter was redacted. The letter drew the appellant's attention in particular to a passage commencing at question 782, where the appellant was "specifically mentioned as a person who worked for a short period of time at L'Aspromonte, but not for 900 hours". The letter stated that "[Ms S] was presented with a copy of [the appellant's] work reference letter and stated in interview that the signature on [the appellant's] letter was not hers". The letter also identified additional evidence relating to Mr C. These documents were itemised and copies were attached to the letter. It stated that the final document in the list "specifically identifies that a work reference document bearing your name was found on [Mr C's] premises as the result of an AFP raid". The appellant was given a period of 28 days to respond. It appears (from the Delegate's reasons) that no response was provided within this time frame.

19 19 On 21 February 2013, the Delegate decided to refuse the appellant's application for a skilled visa. The ground upon which the visa was refused was that the appellant did not satisfy PIC 4020. It is convenient at this point to set out PIC 4020, which was relevantly in the following terms:

- (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
 - (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- ...
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
 - (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;justify the granting of the visa.
- (5) In this clause:

information that is false or misleading in a material particular means information that is:

 - (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

Note: Regulation 1.03 defines *bogus document* as having the same

meaning as in section 97 of the Act.

The expression “bogus document” was defined in s 97 of the *Migration Act* as follows:

97 Interpretation

In this Subdivision:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

In the decision record, the Delegate stated that, “[b]ased on the evidence and information before me, I am satisfied that the TRA skills assessment ... submitted to the Department on 05 August 2009, is a bogus document, as defined in paragraph 97(c) of the Act”. On this basis, the Delegate found that the appellant did not satisfy PIC 4020(1)(a). The Delegate also noted that the appellant had not raised any compassionate or compelling circumstances for the purpose of PIC 4020(4) and therefore the requirements of PIC 4020(1) were not waived.

The appellant applied to the Tribunal for review of the Delegate’s decision.

On 24 June 2014, the Tribunal wrote to the appellant inviting him to comment on or respond to certain information that could be the reason, or part of the reason, for affirming the decision under review. The letter set out the following particulars of the information:

- an employment reference issued to you by L’Aspromonte was fraudulently produced or procured
- the employment reference was provided by you or on your behalf to Trades Recognition Australia to obtain a positive skills assessment in your nominated occupation
- [Mr C] has pleaded guilty in criminal proceedings in Victoria to the manufacture and sale of work references matching the employment reference submitted to TRA to obtain your skills assessment
- [Mr C] has admitted that the work references were fraudulent in content and that they were created to assist clients to apply for permanent residence in Australia

- Your work reference was found in the possession of [Mr C] as a consequence of the execution of a search warrant at his premises.

24 24 The appellant sought an extension of time in which to respond to this letter. An extension was granted to 11 August 2014. On 8 August 2014, in response to a request for a further extension of time, the Tribunal wrote to the appellant inviting him to respond by 5 September 2014.

25 25 On 22 August 2014, the Tribunal wrote to the appellant in response to a request by the appellant for access to written material relating to his application for review. The letter enclosed a CD containing copies of the requested documents. The requested documents included the Tribunal's file in relation to the application for review and the Department's file in relation to the appellant's visa application. The appellant received, as part of these documents, the redacted transcripts of the December 2009 interviews of Ms S. The letter noted that the Department's file included redacted information and that "[a]ll redaction has been performed by the department and not the tribunal".

26 26 On 22 October 2014, the appellant was invited to appear before the Tribunal on 14 November 2014. The appellant requested a postponement. This was granted and a new date set, namely 20 January 2015.

27 27 On 9 January 2015, the appellant's solicitors (Da Gama Pereira and Associates) sent a letter to the Tribunal containing submissions on behalf of the appellant. Among other things, it was submitted that the appellant did not give or cause to be given a bogus or false or misleading document to TRA or the Minister in relation to the visa. Under a heading "Credibility of the statements made by [Ms S]", the letter referred to the transcript of the interview of Ms S conducted on 14 December 2009 and stated that the interview was conducted by Department investigators without a legal practitioner representing the appellant. After quoting Ms S's answers to questions 782 to 786, the letter: stated that the appellant claimed that the signature on the Work Experience Reference was that of Ms S; requested that the Tribunal carry out forensic handwriting analysis of the signature; and requested that the Tribunal write to Ms S "to attend the hearing as a witness".

28 28 On 20 January 2015, the hearing before the Tribunal took place. The appellant was represented at the hearing by a representative of the firm of solicitors acting for him. It appears from the Tribunal's reasons that, at the hearing, the appellant's representative reiterated the request that the Tribunal undertake a forensic analysis of Ms S's signature.

There was also discussion about the appellant's request that the Tribunal summon Ms S to give evidence. As recorded in the Tribunal's reasons at [22], the Tribunal told the representative that if she provided more information regarding the address or contact details of Ms S, it would consider the request.

29 29 On 23 January 2015, the Tribunal issued a summons to the Department to produce documents. The summons required the Department to produce the following documents on or before 9 February 2015:

- • Provide all associated Departmental files and copies of all the evidence (TRIM and ICSE records, file notes, investigation reports, signed statements including any signed or sworn statements from [Ms S], etc) that led to the delegate's finding that the applicant's work reference from L'Aspromonte may have been fraudulently issued to him.
- • Any document or record that confirms that the applicant's work reference from [Ms S] of L'Aspromonte was found in the possession of [Mr C] as a result of the search warrant executed at [Mr C's] residential premises and that this work reference was a court exhibit in the proceedings brought against [Mr C].
- • Any document or record that confirms that the applicant's work reference from [Ms S] of L'Aspromonte was found in the possession of [Mr C] as a result of the search warrant executed at [Mr C's] residential premises and that this work reference was a court exhibit in the proceedings brought against [Mr C].
- • Any document or record that confirms that the applicant's work reference was similar in content and format to any false work references found in the possession of [Mr C] as a result of the search warrant executed at his residential premise.

30 30 On 30 January 2015, the appellant's solicitors sent a letter to the Tribunal setting out some further submissions on behalf of the appellant. The letter stated, among other things, that if the Tribunal was relying on answers provided by Ms S (to questions asked during the December 2009 interviews) that she did not sign the Work Experience Reference, then it was incumbent on the Tribunal to call her as a witness and/or verify her signature. The letter set out some passages from the transcripts of the interviews of Ms S. These were said to raise issues of inconsistency, truthfulness and credibility in relation to Ms S's answers to questions.

31 31 On or around 9 February 2015, the Department provided documents to the Tribunal in response to the summons. These documents included redacted copies of the transcripts of the interviews of Ms S. These documents had already been received by the Tribunal before the hearing, having been provided by the Secretary to the Department pursuant to s 352(4) of the *Migration Act*. It is an agreed fact on the appeal (transcript, p 5) that the Tribunal received

the transcripts of both interviews of Ms S on each of these occasions. On each occasion, the transcripts were provided in a redacted form.

32 32 On 19 February 2015, the appellant's solicitors wrote to the Secretary to the Department. The letter referred to the Secretary's obligation under s 352(4) of the *Migration Act* to give to the Registrar of the Tribunal each document that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the review of the decision. The letter stated that on 30 January 2015, the appellant's solicitors had written to the Tribunal stating that there were no records on the Tribunal file indicating that an attempt had been made to contact Ms S to appear as a witness and verify her signature. The letter then stated: "Before the Tribunal makes its decision, it is important that it verify the signature of [Ms S]". The letter then called upon the Secretary to provide the original signature of Ms S to enable the Tribunal to carry out a forensic analysis. The letter was copied to the Tribunal.

33 33 On 19 June 2015, the Tribunal decided to affirm the Delegate's decision not to grant the appellant a skilled visa. There were two grounds for the decision. The first was that the appellant did not satisfy PIC 4020. The Tribunal described the background to the issue at [8]-[9] of its reasons. The Tribunal dealt with the evidence at the hearing at [10]-[20] of its reasons. At [13], the Tribunal noted that the appellant "maintained that he worked for over 900 hours on a voluntary basis at L'Aspromonte in the period September 2008 to June 2009". The Tribunal set out in some detail aspects of the appellant's evidence. At [14], the Tribunal stated that it found the appellant's oral evidence "frequently vague and unconvincing".

34 34 At [17], the Tribunal referred to the interviews of Ms S. The Tribunal referred to a statement it had made to the appellant during the hearing querying what motivation Ms S could have for lying about the hours the appellant had worked or her signature on the Work Experience Reference. The Tribunal recorded that the appellant responded that he thought Ms S "was just trying to save herself". The Tribunal then stated: "It is unclear, to the Tribunal, why denying the truth of a document which she purportedly signed should be regarded as self-serving".

35 35 At [18], the Tribunal referred to its correspondence with the appellant inviting him to comment on information and noted that it had received a submission "but no substantive response to the actual allegations". The Tribunal noted that at the hearing it had gone through the documents already provided to the appellant. The Tribunal recorded that the appellant stated that "he had been overseas when the Tribunal had written to him and that another

person had been representing him at that time”. The Tribunal further recorded that the appellant indicated that he would respond later, “after having spoken further to his current representative”.

36 36 Under the heading “Further submissions”, the Tribunal referred to the appellant’s solicitors’ letter dated 30 January 2015. The effect of the letter was summarised. The Tribunal stated at [22]-[24]:

22. Prior to the hearing the applicant’s representative had sought that the Tribunal summons [Ms S] to attend. The Tribunal was provided with no information concerning her whereabouts. A Tribunal search of available internet directories provided no relevant information. At the hearing the Tribunal told the representative that if she provided more information regarding the address or contact details of [Ms S] it would consider her request. At the hearing she also demanded that the Tribunal undertake forensic examination of the applicant’s work experience reference from [Ms S] to confirm his claim that he had seen her [sign] it. The Tribunal noted that in [Ms S’s] record of interview she had denied signing it. In any event, as the Tribunal indicated at the hearing, this was not feasible as there was nothing against which to compare it. That is, there is no record in any of the materials before the Tribunal of [Ms S’s] verified or authenticated signature against which the signature on the applicant’s work experience letter could be compared for authenticity. The Tribunal reiterated that if she could provide further information in both respects the Tribunal would further consider her requests. She provided nothing further in this regard other than to copy the Tribunal into her correspondence to the Department seeking documents containing [Ms S’s] signature. The Department subsequently queried the Tribunal regarding her authorisation for the agent to act on the applicant’s behalf and the Tribunal forwarded to it the relevant authorisation form. On 23 January 2015, the Tribunal summonsed the Department for all relevant information and documents concerning the application however none of the material indicated [Ms S’s] address or her signature.

23. In this context the Tribunal notes *Patel v MIBP* [2015] FCAFC 22 in which the majority of the court, considering the extent of any ‘duty to inquire’ by the MRT, stated at [45-6]:

It is not every case in which there is a conflict in evidence that requires an independent decision-maker to undertake its own inquiries or secure the provision of further information which is not presently available to either the claimant or the government agency. Indeed, such cases it may readily be expected are the exception rather than the rule. Nor can a duty to secure further information be transferred by a claimant to an independent decision-maker simply by a claimant providing information that conflicts with the information available to a government agency. And that is the case even where a claimant has attempted, unsuccessfully, to obtain further information.

In all such cases the duty of the independent decision-maker is to undertake a review on such material as is available. That is what the Migration Review Tribunal did in the present case. It was not required to do more.

24. As noted above the Tribunal has sought all relevant information by summons

from the Department and has conducted its own internet search for [Ms S's] contact details but has been unsuccessful. On this basis the Tribunal considers there is nothing further it can productively do, or is required to do, in relation to the representative's requests in this regard.

37 37 The Tribunal's essential reasoning was set out at [25]-[41]. At [36], the Tribunal stated that it placed "particular weight" on certain facts and matters as there set out. These included the "content of [Ms S's] record of interview with the Department in which she acknowledged that she knew [the appellant], denied that she signed his work experience reference, and stated that he did voluntary work [at] L'Aspromonte, not for 940 hours, but 'a couple of hundred maybe' (Q782-786)". The Tribunal stated at [37]-[38]:

37. The discovery of the applicant's work reference at [Mr C's] premises provides a direct link between him, as an individual, and his work experience at L'Aspromonte, to the activities of [Mr C]. The Tribunal has considered the applicant's statement that he had never seen or spoken to [Mr C], but does not accept that [Mr C] was not involved in the production of his work reference on the basis that, if the reference was genuine, there is no plausible explanation for [Ms S] to have provided it to [Mr C] and it would not have been found at his premises. In addition, on [Mr C's] own admission in his sworn statement, he produced fabricated references for a range of employers, including [Ms S] of L'Aspromonte restaurant. In this context, the Tribunal gives more weight to the evidence outlined above than to the applicant's oral evidence, and it considers it is relevantly probative in the circumstances of this case.

38. While the Tribunal acknowledges that it would be difficult for the applicant to now establish that he performed 900 hours of unpaid work over 7 years ago, it considers that the above evidence, suggesting that he did not do so, is compelling. It is not satisfied that he completed over 900 hours of work experience at L'Aspromonte on the basis only of his uncorroborated oral evidence, particularly against the backdrop of the information provided by [Mr C] clearly identifying L'Aspromonte and [Ms S] as participants in the preparation and sale of fake work references to visa applicants and which, on the available evidence, included the applicant's work experience reference.

38 38 The Tribunal concluded, at [39], that it was satisfied that there was probative evidence that the appellant had given, or had caused to be given, to TRA, the Work Experience Reference, and that this document contained a false or misleading assertion that the appellant had completed 940 hours of unpaid work experience at L'Aspromonte, and that this was purposely false or misleading. On this basis, the Tribunal concluded, at [40], that it reasonably suspected that the TRA skills assessment was a document that was obtained because of a false or misleading statement, and was therefore a "bogus document" as defined. (The expression "bogus document" was at this time contained in s 5(1) of the *Migration Act*. It was in materially the same terms as set out in [20] above.) It followed that the appellant did not meet PIC 4020(1).

39 The Tribunal then considered whether the requirements of PIC 4020(1) should be waived and decided that they should not be waived. It followed that the appellant did not satisfy the applicable criteria for a skilled visa.

40 As a separate basis for its decision, the Tribunal considered whether the appellant's skills had been assessed as suitable for the nominated skilled occupation by the relevant assessing authority. In circumstances where TRA had withdrawn its skills assessment, the Tribunal concluded that it was not satisfied that the appellant's skills had been assessed as suitable for his nominated skilled occupation (cook) by the relevant assessing authority. It followed that, for this additional reason, the appellant did not satisfy the applicable criteria for a skilled visa.

The proceeding in the Federal Circuit Court

41 The appellant applied to the Federal Circuit Court for judicial review of the Tribunal's decision. In support of his application, the appellant relied on an affidavit that he affirmed on 10 January 2017. A statement attached to the affidavit included the following:

- (a) The appellant quoted from [22] of the Tribunal's reasons and then stated that the "statement of [the] member doesn't [seem] to be justifiable as the contact details of [Ms S] were clearly mentioned in her statement to [the Department] investigator" and the Tribunal member "had access to those documents". Reference was made to questions 24 and 429, and copies of the relevant pages of the (redacted) transcript were attached.
- (b) The appellant referred to the last sentence of [22] of the Tribunal's reasons and stated that the Tribunal "should have asked directly about [Ms S] to [the Department]" and "I am unable to understand why the tribunal member was unable to find [Ms S's] information since it is clearly mentioned in her statement" (that is, the transcripts of the interviews).
- (c) The appellant also challenged the fact that the Tribunal had sought to find personal information about Ms S on the internet rather than seeking information from the Department.

42 The hearing before the primary judge took place on 14 February 2017. The appellant appeared in person.

43 43 On 3 March 2017, the primary judge delivered reasons for judgment (the **Reasons**). The primary judge set out the relevant background at [3]-[12] and the relevant legislation at [13]-[14]. The primary judge, at [16], stated that the appellant, assisted by an interpreter, raised four principal concerns or grounds of review. However, this summary did not cover the grounds in the affidavit summarised at [41] above, which formed part of the appellant's case. In fairness to the primary judge, it may be that these matters were not the focus of oral submissions.

44 44 The primary judge's reasoning was set out at [18]-[34] of the Reasons. Relevantly for present purposes, the primary judge noted at [18] of the Reasons that the appellant had asked the Tribunal to summon Ms S to attend and the Tribunal had tried to locate Ms S. The primary judge stated that the Tribunal had issued a summons to the Department for all relevant information and documents concerning the application, but "none of the material indicated [Ms S's] address". At [19] of the Reasons, the primary judge referred to *Patel v Minister for Immigration and Border Protection* (2015) 145 ALD 566 (**Patel**) at [45]-[46], where Flick J (with whom Edmonds J agreed) stated:

45 It is not every case in which there is a conflict in evidence that requires an independent decision-maker to undertake its own inquiries or secure the provision of further information which is not presently available to either the claimant or the government agency. Indeed, such cases it may readily be expected are the exception rather than the rule. Nor can a duty to secure further information be transferred by a claimant to an independent decision-maker simply by a claimant providing information that conflicts with the information available to a government agency. And that is the case even where a claimant has attempted, unsuccessfully, to obtain further information.

46 In all such cases the duty of the independent decision-maker is to undertake a review on such material as is available. That is what the Migration Review Tribunal did in the present case. It was not required to do more.

45 45 The primary judge then stated at [21] of the Reasons:

This is what the Migration Review Tribunal did in this case. It was required to do no more. The Tribunal had summonsed the Department, seeking documents. The statements made from the bar table by the Applicant that the Tribunal could have done more have little weight. There was nothing put as to how the Tribunal could have done more even in the event that it was required to. I am not satisfied that there is any error evident in the approach of the Tribunal as disclosed by paragraphs 22 to 24 of its decision.

(Footnote omitted.)

46 46 The primary judge then considered other aspects of the appellant's application. The primary judge concluded, at [34], that the decision of the Tribunal was reasonably open to it,

and there was “probative and compelling evidence that a bogus document had been provided by the [appellant] in relation to the application for a visa”. The primary judge was not satisfied that the decision of the Tribunal was affected by jurisdictional error. Accordingly, the application for judicial review was dismissed.

The appeal to this Court

47 47 The appellant appeals to this Court from the orders of the Federal Circuit Court.

48 48 At the hearing of the appeal, the appellant sought leave to amend his notice of appeal. The Minister consented to the application, and leave to amend was granted. The grounds in the amended notice of appeal are as follows:

1. The primary judge erred by failing to conclude that the purported decision of the second respondent (the **Tribunal**) was affected by jurisdictional error in circumstances where, or by reason that, the Tribunal failed to exercise powers available to it, to obtain information that would have been relevant to assessing the probative weight of information indicating that [Ms S] had not signed a work experience letter indicating that the appellant had completed 940 hours of work experience at L’Aspromonte restaurant.

Particulars

- a. A question arising on the review was whether there was “evidence” before the Tribunal that a favourable skills assessment issued by Trades Recognition Australia with respect to the appellant (**skills assessment**) was a “bogus document”, being a document that the Tribunal “reasonably suspects” was obtained because of a false or misleading statement.
- b. In particular, a question arising on the review was whether there was evidence that a statement in a work experience letter purportedly signed by [Ms S] indicating that the appellant had completed 940 hours of work experience at L’Aspromonte restaurant, and given to the Minister in support of the appellant’s visa application, was false.
- c. The Tribunal answered that question in the affirmative, in part on the basis that [Ms S] had given information in an interview with an officer of the Department to the effect that: (i) she had not signed the work experience letter; and (ii) the appellant had not completed 940 hours of work experience at the restaurant.
- d. The appellant gave evidence that: (i) [Ms S] had signed the work experience letter; and (ii) he had completed 940 hours of work experience at the restaurant. The appellant requested the Tribunal to exercise its powers to test the information to the adverse information from [Ms S]. In particular (but without limitation), the appellant requested that the Tribunal exercise its power to summons [Ms S] to appear as a witness on the review.
- e. The Tribunal did not exercise any of its powers to test the information from [Ms S]. In particular (but without limitation), the

Tribunal did not exercise its powers under section 363(3)(a) of the *Migration Act 1958* (Cth) (the **Act**) to summons [Ms S] to appear before the Tribunal to give evidence.

- f. In its reasons for decision, the Tribunal relevantly stated (at [22]): “The Tribunal was provided with no information concerning [Ms S’s] whereabouts. A Tribunal search of available internet directories provided no relevant information. At the hearing the Tribunal told the representative that if she provided more information regarding the address or contact details of [Ms S] it would consider her request On 23 January 2015, the Tribunal summonsed the Department for all relevant information and documents concerning the application however none of the material indicated [Ms S’s] address or her signature”.
 - g. The Tribunal also relevantly stated (at [24]): “[T]he Tribunal has sought all relevant information by summons from the Department and has conducted its own internet search for the applicant’s [sic] contact details but has been unsuccessful. On this basis the Tribunal considers there is nothing further it can productively do, or is required to do, in relation to the representative’s requests in this regard.”
 - h. In fact, the Tribunal’s summons to the Secretary of the Department on 23 January 2015 was limited. It did not require the Secretary to produce “all relevant information and documents concerning the application”. In particular (but without limitation), it did not require the Secretary to produce any documents recording [Ms S’s] address or other contact information.
 - i. Further, information before the Tribunal clearly indicated that the Department did possess documents recording various contact details for [Ms S]. In particular (but without limitation), the partially redacted transcript of the Department’s interview with [Ms S] that the Secretary (or his or her delegate) gave to the Tribunal clearly indicated that [Ms S] had given various contact details to the Department in that interview, including (without limitation) her home address and her email address.
 - j. In the circumstances of the case, including those described above, the Tribunal erred by failing to exercise its powers to test the adverse information from [Ms S].
 - k. The primary judge erred in concluding (at [21]) that there was no “error evident in the approach of the Tribunal as disclosed by paragraphs 22 to 24 of its decision”. In particular (but without limitation), the primary judge erred insofar as his Honour concluded that there was nothing that the Tribunal “could have done” in order to test the adverse information from [Ms S].
2. The primary judge erred by failing to conclude that the purported decision of the Tribunal was affected by jurisdictional error in circumstances where, or by reason that, the Secretary (or his or her delegate) had failed to comply with his or her obligation under section 352(4) of the Act to give to the Registrar of the Tribunal “each ... document, or part of a document, that is in the Secretary’s possession or control and is considered by the Secretary to be relevant to the review of the decision”.

Particulars

- a. The particulars to ground 1 are repeated.
1. The Secretary (or his delegate) gave to the Registrar of the Tribunal a partially redacted transcript of the Department's interview with [Ms S] that redacted the various contact details that [Ms S] had given to the Department.
- b. On 19 February 2015, the appellant wrote to the Secretary, referred to the Secretary's obligation under section 352(4) of the Act, and indicated that the Tribunal had not attempted to contact [Ms S] to appear as a witness under section 361 of the Act.
- c. In all of the circumstances of the case, it was not open to the Secretary (or his or her delegate) to conclude that any documents in his or her possession or control, recording contact details of [Ms S] (including but not limited to the unredacted transcript of the Department's interview with [Ms S]), were not relevant to the review.
3. The primary judge erred by failing to conclude that the Tribunal erred by failing to have regard to all of the information before it, including (but not limited to) information relevant to assessing the probative weight of information indicating that [Ms S] had not signed a work experience letter indicating that the appellant had completed 940 hours of work experience at L'Aspromonte restaurant.

Particulars

- a. The particulars to ground 1 are repeated.
- b. In assessing the probative weight of the information that [Ms S] had given in an interview with an officer of the Department to the effect that: (i) she had not signed the work experience letter; and (ii) the appellant had not completed 940 hours of work experience at the restaurant, it was necessary for the Tribunal to consider the credibility of that information. including having regard to all of the other information which [Ms S] gave to the Department and that the Secretary (or his or her delegate) gave to the Tribunal.
- c. The Tribunal did not consider other information which [Ms S] had given to the Department and which the Secretary (or his or her delegate) provided to the Tribunal. That inference clearly arises on the basis that the Tribunal at least did not consider those parts of the redacted transcript of [Ms S's] interview with the Department which shows that [Ms S] gave various contact details to the Department.
- d. If the Tribunal had considered all of that information, the Tribunal might have formed a different conclusion as to the probative weight of information indicating that [Ms S] had not signed the work experience letter. In particular (but without limitation), the Tribunal might have formed a different conclusion as to "what motivation she could have for lying about ... her signature on the reference" (Tribunal at [17]).

(Error in paragraph numbering in original.)

49 49 The Minister sought leave, at the hearing of the appeal, to rely on a proposed notice of contention. The grounds set out in the proposed notice of contention are as follows:

1. The decision of the Migration Review Tribunal the subject of the judgment below rested on two alternative and independent bases.
2. The Tribunal first found that the appellant did not satisfy the public interest criterion in cl 4020 of Schedule 4 to the *Migration Regulations 1994* (Cth) and, as a result, the visa criterion in cl 485.224 of Schedule 2 to the Regulations. In particular, the Tribunal was not satisfied that there was “no evidence” that the appellant had given, or caused to be given, a bogus document in relation to his skilled visa application.
3. The Tribunal was also not satisfied that the appellant’s skills had been assessed as suitable for his nominated skilled occupation of “Cook” by Trades Recognition Australia (TRA). As such, the Tribunal found that the appellant did not satisfy the visa criterion in cl 485.221 of Schedule 2 to the Regulations.
4. At first instance, the Federal Circuit Court did not accept that any jurisdictional error affected the Tribunal’s decision. The parties did not, however, make submissions to the Federal Circuit Court about the Tribunal’s decision insofar as it concerned the appellant’s inability to satisfy the visa criterion in cl 485.221. The Federal Circuit Court did not make findings on that issue.
5. No jurisdictional error attends the Tribunal’s finding about the appellant’s inability to satisfy the visa criterion in cl 485.221. That finding stands alone as a separate and independent basis for the Tribunal’s decision. Having regard to that finding, the Tribunal was bound to affirm the decision to refuse to grant the appellant a skilled visa. Any error in the Tribunal’s consideration of the criterion in cl 485.224 could not have affected the exercise of power in such a way as to give rise to jurisdictional error or, alternatively, to warrant the grant of relief.

50 50 The Minister accepted that the contentions set out above had not been raised in the Federal Circuit Court proceeding. The Court indicated at the appeal hearing that it would determine the application for leave to rely on the proposed notice of contention as part of its consideration of the appeal. The Court heard argument both on whether leave should be granted and on the substance of the grounds in the proposed notice of contention.

Consideration

51 51 We will consider each of the grounds of appeal in turn (while noting that there is some overlap between the grounds). Before doing so, we set out the key relevant legislative provisions (as in force at the time of the Tribunal decision). Section 352(4) of the *Migration Act* provided:

The Secretary [of the Department] must, as soon as is practicable after being notified of the application, give to the Registrar [of the Tribunal] each other document, or part

of a document, that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the review of the decision.

52 52 Section 363 relevantly provided:

- (1) For the purpose of the review of a decision, the Tribunal may:
 - (a) take evidence on oath or affirmation;
 - ...
 - (3) Subject to subsection (4), the presiding member in relation to a review may:
 - (a) summon a person to appear before the Tribunal to give evidence;
 - (b) summon a person to produce to the Tribunal such documents as are referred to in the summons;

53 53 PIC 4020 (which formed part of the criteria for a skilled visa) has been set out at [19] above. The expression "bogus document" in s 5(1) of the *Migration Act* was in materially the same terms as set out in [20] above.

Ground 1

54 54 The appellant's submissions in relation to this ground can be summarised as follows:

- (d) (a) The primary judge erred in finding that there was "nothing put as to how the Tribunal could have done more" than it did in order to seek to identify contact details for Ms S in order to summon her to give evidence under s 363(3)(a) of the *Migration Act*. The appellant had, in his affidavit, identified information before the Tribunal in the (redacted) transcripts of interview with Ms S that indicated that the Department had documents recording Ms S's home address and personal email address.
- (e) (b) In effect, the appellant contended below that it was inexplicable that the Tribunal had not exercised its powers to obtain Ms S's contact details from the Department in circumstances where the Tribunal: (a) thought fit to summon the Secretary to produce other documents under s 363(3)(b); (b) was amenable to summoning Ms S if it could identify her contact details; and (c) had made some attempt to identify her contact details (by "search[ing] available internet directories").
- (f) (c) Indeed, the failure of the Tribunal to obtain Ms S's contact details from the Department would be inexplicable, were it to be assumed that the Tribunal had complied with its duty to consider all of the information before it in

determining the review. The only available inference is that the Tribunal did not read, let alone consider, the whole of the transcripts of interview with Ms S.

- (g) (d) Thus, contrary to the findings of both the primary judge and the Tribunal, the Tribunal could obviously and easily have done more to find Ms S: for example, it could have summoned the Secretary to produce documents recording her contact details.
- (h) (e) Furthermore, the adverse information which Ms S gave at her interviews with the Department was critical to the outcome of the appellant's case. The appellant denied the accuracy of what Ms S had told the Department, and indicated that there may be issues as to her credibility. He therefore, reasonably, wished to have the Tribunal test Ms S's information by summoning her to give evidence to the Tribunal.
- (i) (f) The appellant had no power to obtain Ms S's contact details. He had already done everything reasonably within his power, including by requesting the Tribunal to give access to unredacted transcripts of interview and writing directly to the Department to seek information (including noting that no attempt had been made to contact Ms S). Accordingly, the appellant was entirely reliant on the Tribunal performing its function lawfully, including by exercising its powers (including under s 363) reasonably.
- (j) (g) This was a case where there was an obvious inquiry about a critical fact, easily obtained by the Tribunal: see the observations of Wilcox J in *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 (**Prasad**) at 169-170. In *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429 (**SZIAI**), the High Court criticised the expression "duty to inquire" as "apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error" ([25]). The Court recognised that "[i]t may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review" and that "[i]f so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction". The Court also recognised that "[i]t may be that failure to make such an inquiry results in

a decision being affected in some other way that manifests itself as jurisdictional error”.

- (k) (h) Subsequently, in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, the High Court confirmed that a legally unreasonable failure or refusal to exercise a discretionary power could result in jurisdictional error: see [56], [59], [63], [83], [90], [99], [100].
- (l) (i) More recently, in *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 at [136]-142], Bromberg J engaged in a thorough survey of cases and principles regarding the consequences of a failure by the Tribunal to exercise a power to inquire. See also *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at [49]-[52]; *Minister for Immigration and Citizenship v Le* (2007) 164 FCR 151 (**Le**) at [64]-[79]; *MZABA v Minister for Immigration and Border Protection* (2015) 234 FCR 425 at [69]-[78]. See also, in relation to legal unreasonableness, *AZAFB v Minister for Immigration and Border Protection* (2015) 244 FCR 144 at [21]-[28].
- (m) (j) Here, jurisdictional error (whether characterised as a constructive failure to exercise jurisdiction or as a legally unreasonable failure to exercise a discretionary power by the Tribunal) is manifest. Viewed through the lens of legal unreasonableness, the Tribunal’s failure to summon Ms S should be assessed by reference to the reason that it gave for not doing so: see *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at [45], [47]. The reason the Tribunal gave was that there was nothing further that it could do to identify Ms S’s contact details. That was manifestly wrong, and reflected a failure by the Tribunal to consider the whole of the transcripts of interview: see *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426 at [68], [69], [71], [79]; *Perera v Minister for Immigration and Multicultural Affairs* [2002] FCA 743 (**Perera**) at [49]; *Abebe v Commonwealth of Australia* (1999) 197 CLR 510 at [151]; *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at [59], [129], [191]-[199].
- (n) (k) The sole authority relied on both by the Tribunal and the primary judge, *Patel*, is distinguishable. In that case, Flick J (with whom Edmonds J

agreed) referred to *SZIAI* but said that “[o]n the facts of the present case, there was no readily available information to which any duty of inquiry could ... attach”; “there was no real prospect that any inquiry would have resulted in any relevant information being made available” ([40], see also [44]). Here, there was such a prospect. There was a real (indeed virtually inevitable) prospect that the Department had contact details for Ms S. The Tribunal’s unreasonable failure to exercise its powers to get Ms S’s contact information reflected its failure to consider the material before it, which showed that the Department had such information. The primary judge erred by failing to recognise this.

55 55 For the reasons that follow, we do not consider that the appellant has established that the primary judge erred in not concluding that the Tribunal’s decision was affected by jurisdictional error.

56 56 There does not appear to be any significant difference between the parties as to the applicable principles, which may be briefly stated as follows. The authorities establish that the Tribunal has no general obligation to initiate enquiries or to make out an applicant’s case for him or her: *Le* at [60] and cases there cited. In *SZIAI*, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ noted (at [20]) that “[t]he failure of an administrative decision-maker to make inquiry into factual matters which can readily be determined and are of critical significance to a decision made under statutory authority, has sometimes been said to support characterisation of the decision as an exercise of power so unreasonable that no reasonable person would have so exercised it”. Their Honours said (at [21]) that the observations of Wilcox J in *Prasad* may support such a proposition. After noting, at [23], that the proposition that may emerge from *Prasad* had not been the subject of full consideration by the High Court, and referring to observations that had been made in certain cases, their Honours said (at [25]):

Although decisions in the Federal Court concerned with a failure to make obvious inquiries have led to references to a “duty to inquire”, that term is apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error. The duty imposed upon the tribunal by the Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional

error. It is not necessary to explore these questions of principle in this case.

(Footnote omitted.)

57 57 In the present case, it may be accepted that there was more that the Tribunal could have done to obtain contact details for Ms S. For example, the Tribunal could have specifically asked the Department for Ms S's contact details. If necessary, the Tribunal could have issued a summons to the Department requiring it to produce documents with this information (such as unredacted copies of the pages of the transcripts with Ms S's home address and email address). The statement at the end of [22] of the Tribunal's reasons that "none of the material indicated [Ms S's] address" was incorrect or, at least, incomplete. In fact, as indicated above, the transcripts of the interviews included questions about Ms S's home address and email address, with the answers redacted. An unredacted copy of the transcripts would have shown Ms S's home address and email address as at December 2009. The primary judge stated, at [21] of the Reasons, that "[t]here was nothing put as to how the Tribunal could have done more". While this may reflect the way the appellant's case was presented orally, the appellant's affidavit in fact indicated how the Tribunal could have done more to obtain Ms S's contact details. It was thus evident on the material that the Tribunal could have done more to obtain Ms S's contact details.

58 58 However, the failure of the Tribunal to specifically seek Ms S's contact details from the Department (or require the Department to produce documents containing such information) needs to be seen in context. There is no indication that the appellant or his representative drew the Tribunal's attention to the pages of the transcripts that showed that Ms S had been asked for her home address and email address. The transcripts are lengthy documents and the pages on which these questions appear are not proximate to the passages in which Ms S said that she did not sign the work references and that the appellant worked only a "[c]ouple of hundred [hours] maybe". In these circumstances, it is difficult to criticise the Tribunal for not focussing on the pages of the transcripts relating to the home address and email address.

59 59 This is not a case where the Tribunal failed to make an inquiry about a critical fact in issue in the proceeding. Ms S's contact details did not constitute a critical fact in this sense; they were merely relevant for the purposes of locating a witness in order to serve a summons. Further, it cannot be assumed that the contact details held by the Department would have enabled Ms S to be served. The home address and email address referred to in the transcripts of interview were as at December 2009. She may well have moved or changed her email

address between that time and the time of the Tribunal hearing (January 2015). In light of these matters, we do not consider there to be a “sufficient link” between any error by the Tribunal in failing to obtain Ms S’s contact details and the outcome of the review (see *SZIAI* at [25]). Although the Tribunal indicated that it was amenable to summoning Ms S, and made attempts to ascertain her contact details, it appears that this was at the request of the appellant. It does not follow that the Tribunal considered further evidence from Ms S to be material to the outcome of the review.

60 60 We note also that there was a large body of material before the Tribunal that supported the conclusion that the TRA skills assessment was a bogus document. Apart from the statements made by Ms S as recorded in the transcripts, there was a body of material relating to Mr C. In these circumstances, it is doubtful whether any evidence given by Ms S (even if she disavowed her earlier statements) would have affected the outcome (having regard to the terms of PIC 4020 and the definition of “bogus document”). We note that there was no argument or submission in this case to the effect that, on a proper construction of PIC 4020, it was not open to the Tribunal to conclude the appellant had “given, or caused to be given” a bogus document to the Minister, for the purposes of the application of PIC 4020.

61 61 While the focus of the appellant’s submissions is on the failure of the Tribunal to obtain Ms S’s contact details, the appellant also relies on the failure to summon Ms S to give evidence. Although the Tribunal appears to have overlooked that there was a ready means available to obtain contact details for Ms S, we do not consider any error in this regard to be sufficient to conclude that it was legally unreasonable for the Tribunal not to exercise its power to summon Ms S. There was an intelligible, if mistaken, basis upon which the Tribunal did not exercise the power. It is relevant and important to take the context into account. As noted above, the context included that: the pages of the transcript that indicated that Ms S had been asked about and provided her home address and email address were not proximate to the pages that were directly relevant to the issues before the Tribunal; the transcripts were lengthy documents; and it does not appear that the appellant or his representative drew the Tribunal’s attention to the pages of the transcript relating to Ms S’s home address and email address.

62 62 For these reasons, we reject ground one.

Ground 2

63 63 The appellant submits that the Tribunal made a jurisdictional error by reason of the failure of the Secretary to discharge his obligation, under s 352(4), to provide obviously relevant information (contact details for Ms S), to the Tribunal. The appellant accepts that the decision of the Full Court in *SZOIN v Minister for Immigration and Citizenship* (2011) 191 FCR 123 (*SZOIN*) stands in the way of this ground succeeding. The appellant's outline of submissions states that he "formally submits" that *SZOIN* was wrongly decided. This matter was not the subject of elaboration during oral submissions.

64 64 It is well settled that a Full Court of this Court has the power to decline to follow a previous decision of a Full Court of this Court, but should do so only when the previous decision is plainly wrong: *Transurban City Link Ltd v Allan* (1999) 95 FCR 553 at [26]-[31]; *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214 at [8], [146]-[149] and [187]-[192]; *Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2016) 244 FCR 178 at [13]. In the absence of any detailed submissions, we are not persuaded that *SZOIN* is plainly wrong. In these circumstances, we reject ground two.

Ground 3

65 65 The appellant's submissions in support of this ground can be summarised as follows:

- (o) (a) The Tribunal had before it the redacted transcripts of interview with Ms S. The transcripts were provided by the Secretary twice: initially under s 352(4) of the *Migration Act*; and subsequently in response to the summons issued by the Tribunal under s 363(1)(b). Impliedly (including from s 56), the Tribunal was required to have regard to all of the material it obtained from the Secretary under s 352(4) in making its decision on the review: see *Perera* at [49]; *Minister for Immigration and Citizenship v SZKTI* (2009) 238 CLR 489 at [37]-[45]; *SZLPO v Minister for Immigration and Citizenship (No 1)* (2009) 177 FCR 1 at [91]-[92]. In any event, expressly, s 359(1) required the Tribunal to "have regard to" the information that it received from the Secretary in response to the summons.
- (p) (b) To discharge its duty to "have regard to" the information it received from the Secretary, the Tribunal was required to undertake an "active intellectual engagement" process, in accordance with which it had to give that

information “proper, genuine and realistic” consideration: see, for example, *SZRLO v Minister for Immigration and Citizenship* [2013] FCA 825 at [49]-[52]; *DZADQ v Minister for Immigration and Border Protection* (2014) 143 ALD 659 at [42]-[44]. These decisions applied *Minister for Immigration and Citizenship v Khadgi* (2010) 190 FCR 248 at [57] in the context of the equivalent provision in s 424(1). Any failure by the Tribunal to do so involves jurisdictional error. Unless the Minister can demonstrate that, but for that error, the Tribunal would inevitably have made the same decision, then the Court must quash the Tribunal’s decision.

- (q) (c) Here, it is apparent that the Tribunal read limited parts of the transcripts – at least those parts in which Ms S denied signing the Work Experience Reference. But the Tribunal plainly did not read (or “have regard to”) the whole of the transcripts. If it had read the pages of the transcripts that record Ms S giving her contact details to the Department, then it could not possibly have concluded (as it did) that there was nothing it could do in order to ascertain Ms S’s contact details. That obvious inference is reinforced by the following two additional considerations.
- (r) (d) First, in response to the appellant’s argument about the credibility of Ms S, the Tribunal queried why she would lie about signing his letter, and why her denial of the truth of the document would be self-serving. If the Tribunal had properly considered the transcripts it would have been apparent that Ms S was at all turns seeking to play down her role in Mr C’s scheme. She denied any knowledge of what was really happening, or that she had been paid and that she had signed any document. She underestimated the number of students who were alleged to have worked in the restaurant. Her position, in the interview, was that her role in the scheme was innocent and unwitting.
- (s) (e) The investigators were sceptical about the truth of those statements, as evidenced by the number of times they returned to matters such as whether Ms S had signed documents and how much she knew about the scheme. In addition, on at least one occasion, Ms S was equivocal in her answer about whether she could remember people and whether or not they had worked in the restaurant for 900 hours. That is important in circumstances where Ms S

accepted that many of the students who had come through the restaurant had worked the full complement of hours.

- (t) (f) Critically, for Ms S to admit to signing any document would have implicated her in the scheme, something which she had a clear motive to avoid. There was, as such, a reason why she might lie about whether she had signed the Work Experience Reference. Denying the truth of such a document could, contrary to the Tribunal's comment, easily be seen as self-serving and there could be real doubt about her credibility in those circumstances.
- (u) (g) Secondly, the Tribunal in its decision only twice referred to a pinpoint reference in the interview, being questions 782-786. That is the part of the interview where the appellant is mentioned. It is a section of the interview that was reproduced in the appellant's submissions, and as an attachment to those submissions. The Tribunal's failure to refer specifically to any other part of the interview or to discuss the contents of the interview in any depth supports an inference, along with the matters above, that the Tribunal did not properly consider or engage with the whole of the transcripts.

66 66 We do not think it is established that the Tribunal failed to have regard to the transcripts of the interviews and so failed to carry out its review obligations.

67 67 Insofar as the appellant's submissions rely on the pages of the transcripts that record questions about Ms S's home address and email address, it is relevant that, as noted above, it does not appear that the appellant or his representative drew the Tribunal's attention to these pages. The fact that (in the context of the request to summon Ms S) the Tribunal appears to have overlooked those passages of the transcript does not establish a failure to have regard to the transcripts as a whole for the purposes of the review.

68 68 Insofar as the appellant's submissions rely on the transcripts more generally, the Tribunal's reasons demonstrate that it undertook an "active intellectual engagement" with the transcripts. The Tribunal referred to and considered the part of the transcripts that was most relevant to the issues that arose on the review. It was not necessary, in the circumstances, for the Tribunal to discuss or refer to other parts of the transcripts. It is not clear whether all of the factual contentions about the transcripts now made on behalf of the appellant were made to the Tribunal. But, even assuming such contentions were advanced, it was not necessary for the Tribunal to refer to each of those contentions. The Tribunal's reasons contain sufficient

consideration of the material in the transcripts to make clear that the Tribunal discharged its obligation to have regard to the transcripts.

69 69 For these reasons, we reject ground three of the notice of appeal.

Application for leave to rely on proposed notice of contention

70 70 In light of our conclusions in relation to the grounds of appeal, it is unnecessary to consider the Minister's application for leave to rely (out of time) on the proposed notice of contention. The Minister accepts that the matters set out in the proposed notice of contention were not raised before the primary judge. No explanation has been provided as to why the matters were not raised below or for the delay in raising the proposed notice of contention. In all of the circumstances, including that it is unnecessary to consider the matter because of our conclusion in relation to the appeal, we consider the appropriate course to be to dismiss the application for leave to rely on the proposed notice of contention.

Conclusion

71 71 For the reasons set out above, the appeal is to be dismissed. There is no apparent reason why costs should not follow the event. Accordingly, we will also order that the appellant pay the Minister's costs of the appeal (other than the costs of the application for leave to file a notice of contention), to be fixed by way of a lump sum.

I certify that the preceding seventy-one (71) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Tracey, Mortimer and Moshinsky.

Associate:

Dated: 3 April 2018